VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., EDITOR.
FRANK MOORE AND JAMES F. MINOR, ASSOCIATE EDITORS.

Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

The Legitimate Result.

No one can for an instant presume that the horrible murder of Judge Thornton L. Massie, Commonwealth's Attorney Foster and Sheriff Webb in Carroll County on the 14th inst. was the result of the attacks upon the judiciary of the country, so recently made by prominent men; or that in any way it was produced by the inflammatory speeches made of late, urging the recall of judges or of their decisions, when the opinion rendered did not suit the majority of a community. The murderers in Carroll were of a class who would not know what the "recall" meant. They were ordinary mountain ruffians, members of a clan, so to speak, one of whom was on trial for a felony.

But the principle upon which they acted is exactly the same which is today seriously urged upon the people of these United States, by men who ought to know better. Floyd Allen was a popular mountaineer; he had committed a felony; was on trial; was convicted. The Attorney for the Commonwealth arose and asked for the judgment and sentence of the court in accordance with the verdict of the jury. The Court was about to pronounce sentence when the friends of the prisoner, who did not like the result of the trial, took advantage of superior numbers and with the aid of their fire arms, removed the obnoxious members of the Court and attempted to release the prisoner. This is the "recall" in its most primitive and horrible shape, but wherein does it differ, save in violence, from the method now seriously suggested and vehemently urged as a great political measure. In one case the life of a pure, upright, honourable judge is taken because the conviction of a felon does not suit the mob. In the other the official life of the Judge is terminated because his decision does not suit the mob or the passion of the moment, and the greatest safeguard of human liberty becomes the sport and

plaything of demagogues and the unthinking multitude. It is hard for any one reared under the traditions of the fathers to realize for one moment the madness which actuates those who would seriously submit to the proletariat judicial questions, or who would make the tenure of the judicial office terminate upon the rendition of an unpopular opinion. That judges err no one denies—that majorities are always right no sane man can affirm. But he who asseverates that popular opinion or prejudice is more likely to obtain justice than the courts, or that popular elections are the remedy either for corrupt or unwise decisions, is either lacking judgment or a dangerous man to follow. The very idea of the courts is to have tribunals which should stand between the people and the passions of the moment. Who can doubt that if the "recall" had been in active operation in 1857 Taney would have been removed as Chief Justice when he decided the Dred Scott case? And yet his decision in that case was absolutely, unquestionably and beyond all doubt just, upright, and the very law, and so recognized today by all sober thinking men. Marshall would have been removed if the followers of Jefferson, who were a majority of the voters during the greater part of his Chief Justiceship, could have used the recall, when in opinion after opinion he rivetted the links of the chain which bound the unwilling sovereign States to the Federal Government. The Constitution—a check upon the people placed by their own act, to save themselves from themselves—was made hard of amendment in order that "cooling time" might elapse against a great, mad popular uprising. Courts were given powers hitherto unknown in the history of nations, in order that the great benefits of self government might not be overthrown by clamour and wild revolutionary movements, engineered by crafty demagogues in the name of human liberty. Judges were to be removed as far as possible from the impulses of the moment and from the will of a majority, and not until of late years has there been found any one so wild as to suggest that the independence of the courts was not essential to the protection of human life, liberty and property. A decent, orderly and just method was provided of removing a corrupt judge from office. This method was made *hard* to meet the very danger which now is suggested as a remedy, i. e., trial and judgment by the electorate. Murder is

a horrible thing, but of the two methods we solemnly affirm that it is less objectionable than the recall; because the horror of it, the hideousness of it, the crime of it, will bring the revulsion of popular sentiment which will sternly repress even the attempt. But the "official murder" is so subtle, so flattering, so easily made the tool of demagogues, so responsive to the angry passions of the multitude that like some slow and subtle poison it will enter the veins of government and paralyze the very sources of liberty and destroy freedom in freedom's name.

This unrest—this mad condemnation of a system because its results are not always in accordance with the will of a temporary majority—should be soothed by wise and serious thinking men discussing it in the most fearless and earnest manner, and by showing to the people the ultimate result of such a course. Never in our history was there greater need of recalling to mind the first charge ever given to a people and their judges: *"Thou shalt not follow a multitude to do evil;* neither shalt thou speak in a cause *to decline after many to wrest judgment*—neither shalt thou countenance a poor man in his cause. Ye shall not respect persons in judgment; but ye shall hear the small as the great; *ye shall not be afraid of the face of man;* for the judgment is God's."

Judge Thornton L. Massie.

The death of such a man under such awful circumstances deserves more than a passing notice; for Judge Massie in his death showed clearly that he was one of those judges who was not "afraid of the face of man." He had been warned that trouble might be expected and was urged to go upon the bench armed. His reply was, "Rather than indicate a fear of lawbreakers by sitting on the bench with a weapon in my pocket I prefer to be killed in the administration of justice"—just what might have been expected of a brave, upright minister of the law. Scarcely an hour later he murmured in the death agony, "I am dying, but I did my duty." Of such a man, such a judge, Virginia may well be proud—aye, all America! And we believe that there are many like him yet in this Old Dominion,

thank God! who would do their duty and decide any case as their conscientious idea of justice and right directed them, in the face of an angry mob, whether armed with ballots or bullets. Woe to the Commonwealth when her judges shall fear either!

Judge Massie was in the forty-sixth year of his age. Descended from honoured English ancestry, his forbears were men of worth and standing in Virginia from 1698 and were legislators and soldiers, always occupying prominent places in their communities. He was born in Nelson County, educated by private tutors, at Pantops Academy in Albemarle County, and at the University of Virginia. In 1888 he settled at Pulaski and commenced the practice of his profession, and soon took a high stand at the Bar. Appointed by Governor Swanson to fill a vacancy in 1908 in the 21st Judicial Circuit, he was subsequently elected to the position by the General Assembly. As a judge he gave complete satisfaction. Painstaking, thorough, conscientious, fearless and a noble Christian gentleman, and upright judge. Above the bench where he fell in discharge of his duty the people of this Commonwealth should erect a memorial and place upon it his dying words, to serve not only as a testimonial to his exalted worth, but to hand down to future generations the splendour of his example and his matchless courage.

The Recall in a Patent Case.

It is quite easy to see a splendid opportunity to work the "Recall" in a very recent case decided by the Supreme Court of the United States. The case is Henry *v.* Dick and was decided on the 12th of last month. The Court by a majority of one —only seven Justices sitting—decided that a patentee may lawfully prescribe the conditions under which his patented devices shall be sold and used. A mimeograph patentee required all purchasers to use only such ink, paper and stencils and supplies as the company which manufactured the mimeograph furnished. A person sold a pound of ink to the owner of one of these machines, for use on the machine which was not the ink which the purchaser of the machine was required to use. A suit was brought and the

court asked to decide if this person became an infringer of the patent because he knew that there was a license restriction upon the use of the machine and expected his ink to be used in violation of that restriction. The Court decided that this sale constituted an infringement of the patent and a loud outcry has been raised against it, although Congress has immediately taken action to correct the law. We cannot exactly see any reason for this outcry. It is true three out of seven judges dissented, but looking at the case from an ordinary standard we do not see any great error in it. The grant of a patent creates an absolute monopoly in the patentee. He can make and sell the patented article and no one else can do so. He need not make it if he does not choose to do so, and if he does not, nobody else can. Has he not therefore a clear, indisputable right to say "I will not make and sell this machine except upon certain terms. You need not buy it if you do not like these terms, but if you do buy you must live up to your contract." There may be an excellent reason for this: The man inventing the machine knows best how and in what manner it ought to be used to get the best results. If it does not bring good results the sale will be defeated. In this case the patentee worked out a machine which gave best results with a certain ink and other supplies. Desiring his machine to do the best work he sold it with a proviso that only this ink and these supplies should be used. That was part and parcel of the contract. The purchaser could not complain, as he assented to it before the purchase. Is it unreasonable or unjust to hold this man to his bargain and prevent another man from inducing him to violate his contract? For the sale of this ink infringed the patentee's rights, just as much as the manufacture and sale of the machine would have done.

The cry about a monopoly will not do; for it must be remembered that the very object of the patent law is to create a monopoly in the thing patented—a monopoly, however, which only lasts for a term of years. The Chief Justice's opinion is very strong and somewhat sarcastic. He holds that the majority of the Court sticks too closely to the letter of the law; but he must remember what a howl was raised because the Court did not stick to the letter of the law in the Trust cases. Perhaps the majority of the Court remembered this. But they do not satisfy

the press any more with this decision than with the other. The fact is we are inclined to think the press and public, as far as judicial decisions are concerned, are very much like that unfortunate soldier who was being flogged by the Irish sergeant. "A little higher, Sergeant," he would yell, and then, "A little lower, Sergeant." "Bad cess to ye," shouted the sergeant, as he brought down the cat-o-nine-tails, "There's no plasin' ye, no matter where I hit ye."

But at the same time we cannot reconcile this decision with the *Dr. Miles Medical Co. v. John W. Park,* April Term, 1911, where the Court held that the proprietor of a patent medicine could not fix the price for all sales, whether at wholesale or retail. Justice Holmes dissented in this case, so he is consistent in holding with the majority in the Dick case; but Judge Lurton, who decided the Miles case in the Circuit Court, which decision was affirmed in the Supreme Court, writes the opinion of the Court in the Dick case. Probably Mr. Justice Holmes' "ineluctable logic" in his dissenting opinion in the Miles case converted Lurton J. The case is one easily remedied by the law making power, which is all the more reason why the Court should adhere to the strict letter of the law.

Our English cousins had the same difficulty. The Judicial Committee of the British Council upheld a patentee's rights in exact accordance with the present decision of our Supreme Court of the United States. Thereupon Parliament passed the following act in 1907:

"It shall not be lawful in any contract made after the passing of this act in relation to the sale or lease of our license to use or work any article or process protected by a patent, to insert a condition the effect of which will be

(a) To prohibit or restrict the purchaser, lessee or licensee from using any article or class of articles, whether patented or not, or any patented process supplied or owned by any person other than the seller, lessor, or licensor or his nominees; or,

(b) To require the purchaser, lessee, or licensee to acquire from the seller, lessor, or licensor, or his nominees, *any article or class of articles not protected by the patent.*

And any such condition shall be null and void, as being in restraint of trade and contrary to public policy.

Provided that this sub-section shall not apply if (i) the seller, lessor, or licensor proves that at the time the contract was entered into the purchaser, lessee, or licensee had the option of purchasing the article or obtaining a lease or license on reasonable terms, without such condition as aforesaid."

Congress can very readily remedy the trouble by a similar enactment.

Law Reform.

That our laws of civil and criminal procedure are behind the spirit of the age cannot be successfully denied. The question is, shall they be reformed by demagogues, or by men learned in the law? It behooves the profession, therefore, to seriously consider present defects and see to it that wise remedies are adopted before quacks try their hands with patent nostrums. The American Bar Association is active, both in inquiry and suggestion. According to its statistics new trials are granted in forty-six per cent of all the cases in our courts involving a penitentiary offense. And in sixty per cent of this number the new trial is granted not because of a question affecting the possible guilt or innocence of the prisoner, but because of a purely technical point of dispute in the conduct of the case.

In nearly half of the criminal cases in American courts it requires two or more trials to convict a prisoner. And in sixty per cent of these cases his guilt is plain. He is given a new trial because the higher court holds that there has been an error of "pleading and practice" either on the part of the lawyers or the judge.

Hugh Weir, giving examples of the technical rulings, practice and abuses in our courts, says:

"Here are two cases from Alabama and North Carolina which sound almost incredible. Indeed, were they not matters of court record, the average American citizen would dismiss them with a shrug as sensational journalism:

"In the former state a man charged with murder went free because the Clerk of Courts, in writing the word 'malice' in the indictment left out the letter 'i'.

"In North Carolina an enraged citizen shot a neighbor through the breast, inflicting a wound which resulted in the latter's death and his own arrest for murder. A short time later, however, he was released from custody. In the indictment the clerk had spelled breast as 'b-r-e-s-t'. The court held that the misspelled indictment was not legal and freed the prisoner."

We could wish that Mr. Weir had quoted volume and page for these two decisions, as we cannot imagine the *absolute* acquittal and *final discharge* of any prisoner, under the circumstances detailed, in any civilized community.

But in civil procedure the matter is receiving attention from more sources than one. The Executive Council of the National Civic Federation is urging the passage of a bill now in Congress (known as Senate No. 3750 and House No. 16461) designed to prevent delay and unnecessary cost in litigation through reversals by higher courts on technicalities.

The text of the bill is as follows:

"No judgment shall be set aside or reversed, or new trial granted by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties. The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and he and any court to which the case shall thereafter be taken on writ of error shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require."

President Low of the Civic Federation is also addressing letters to the Governors of the States in which Legislatures are now in session, asking them to urge the passage of this bill by their respective Legislatures:

It has already become a law in Kansas, Wisconsin and California and in Ohio it has been adopted with some modifications.

The Civic Federation is acting in conjunction with the Committee of the American Bar Association, and upon the Committee our own State is represented by William Minor Lile, the distinguished Professor of Law in our State University, and by Harry St. George Tucker, former President of the American Bar Association.

The Conflict of Laws in Great Britain.

We are very apt in this country to think that we alone are troubled by differences in the laws of our several commonwealths, and to imagine that Great Britain is a country in which uniformity of law prevails. Quite the opposite is the case.

A very nice point, arising out of the conflict between the English and Scottish law of seduction, was raised in an action for damages for seduction by a lady against the executrix of a man with whom she had lived without being married (Soutar *v.* Peter). By English law seduction does not form a ground of action for damages at the instance of the woman seduced; by Scottish law it does. But in order to maintain an action *ex delicto* in the Scottish courts when the wrong is committed in another country, the wrong must be one for which an action can be maintained by the laws of both countries. It was urged for the defendant that the seduction had been completed in a certain hotel in English territory, where the woman, in fact had first had intercourse with her seducer, and therefore that the action could not lie. The judge, however, held that the case was peculiar in this respect, that, while the seducer obtained the last favours in England, he was avowed to have practiced his wiles, and so seduced the lady's affections, in Scotland. He held that in ascertaining the *locus delicti* regard must be had not only to the place where the woman actually lost her virtue, but also to the place where the preliminary steps were taken by the wrongdoer; and he therefore decreed a preliminary issue to be tried as to the place and manner of the seduction.

The question of the proper tribunal to determine an action on a contract in English form made between an English and a Scot-

tish company, which was to be carried out in Wales, was discussed in the case of *James Howden & Co.) (Lim.) v. Powell Duffryn Steam Coal Co. (Lim.)*. The plaintiffs, a firm of Glasgow engineers, sued the defendants, whose registered office is in London, for the balance of the price of erecting a certain plant at the defendants' power station in South Wales. There was a provision in the contract for arbitration according to the English Arbitration Act, 1889; and the defendants demurred to the Scottish jurisdiction on the grounds (1) that the forum was unsuitable and that the issue should be tried in London; (2) that the action was premature, and that the parties should submit to arbitration or submit a case to the English courts, in accordance with the British Law Ascertainment Act, 1859, to determine the scope of the arbitration clause. The Scottish court overruled both pleas. Upon the first it said that the plea of *forum non conveniens* can never be sustained unless the court is satisfied that there is some other tribunal having competent jurisdiction in which the case may be tried more suitably 'for the interest of all parties and the ends of justice,' and the balance of convenience was no sufficient reason for preferring the courts of another country. On the second point the court adopted the rule laid down in a similar case (*Municipal Council of Johannesburg v. D. Stewart & Co.* 1909), that where the whole question is one of the interpretation of the English language in an English contract, and no matter peculiar to the law of England enters into it, the Scottish judges are entitled to interpret that language —which they are supposed to know equally well with the English judges.

The Automobile as a Law Reformer.

The smoothness and celerity with which the English Practice Act works has been exemplified in a recent case in the Irish Court of Appeals—Brien *v.* Fentus. The plaintiff brought an action against the husband alone for injuries caused by a motor accident. The defendant made an affidavit setting forth his defence to the action, and alleging that the motor car was the property of his wife, who had separate estate, and that it was insured against accident in her

own name. The King's Bench Division, in remitting the action for trial to the County Court, ordered the wife to be added as a co-defendant, and the defendant appealed. It was urged that as the plaintiff would not be allowed to add a defendant for the purpose of including a new cause of action *a fortiori* he could not add the wife as defendant for the purpose of creating a cause of action for the first time. The Lords Justices, however, held that in such a case the plaintiff, on discovering that his remedy was against the wife of the person originally sued, could add her as defendant, and that the only terms would be that the costs would be costs in the action.

Can any one give any sensible reason why a similar procedure should not be adopted in this country?

The Novelists and Law of Libel.

Apropos of our editorial in the March REGISTER upon "Unintentional *Libel*" we cannot forbear copying the following from the *London Daily Telegraph.*

"If the juries of other days had exhibited the generous tendencies of their descendants towards plaintiffs in libel actions, both Thackeray and Dickens might well have figured in court at the suit of various prototypes of the characters they drew. Why should not Mr. Justice Gaselee have brought an action against the latter in the Court of Common Pleas? Everybody knew what fun was being made of that painstaking judge when the doings and sayings of Mr. Justice Stareleigh were given to the public in the 'Bardell *v.* Pickwick' number of the 'Pickwick Papers.' When the pen of Dickens was recording the oddities of Stareleigh, J., Mr. Justice Gaselee was a judge of some three years' standing. If an action of 'Bompas *v.* Dickens' had been started and set down for trial the learned sergeant-plaintiff could hardly have secured heavy damages. The performance of Sergeant Buzfuz, in 'Bardell *v.* Pickwick,' was so good from the professional point of view that Sergeant Bompas, if identified with that fictitious person by the readers of 'Pickwick' can have derived nothing but advantage from the advertisement. In point of fact Mr. Charles Carpenter Bompas was not in the first flight of advocates, and the speech for the plaintiff delivered by Ser-

geant Buzfuz was infinitely better than any he could have made in like circumstances. There is a tradition that Mr. Stryver—of the "Tale of Two Cities'—was intended as a portrait of Mr. Edwin John James, Q. C., M. P., Recorder for six years of the Borough of Brighton. Any claim Mr. James might have brought against Charles Dickens would probably have resulted in a plea of justification. Seldom has a barrister risen so high and fallen so low. He was disbarred in 1861."

March Term of the Virginia Supreme Court of Appeals.

The Court met at its regular session in March and on its first Opinion Day, Thursday, March 15th, the Court handed down opinions in thirty-one cases. Sixteen were reversed, fourteen affirmed, and one writ dismissed.

In two of the cases which were for personal injuries the lower court was reversed on account of improper instructions—which seems to be the almost universal rule now in this class of cases.

In the first case, *Southern Railway v. Childress,* the instructions given by the lower court ignored, so the Supreme Court says, the rule which requires a brakeman to inspect a brake before using it. In the second case, *Carter v. The Dan River Cotton Mills,* the employee noticed a defect in the machinery and notified the Company, who promised to remedy the defect. The defect was not remedied in a reasonable time, and the employee was hurt by the defective machinery. The Court held that he should have left the service of the Company if the defect was not remedied, and that by remaining he is presumed to have waived his objection and assumed the risk. The hardship of the latter case lies in the fact that in all probability the employee's living for himself and family depended upon his holding his place, but of course this argument could not for one instant have been considered by the Court. These decisions, though upheld by ample authority, certainly seem to justify the demand which is now so widespread for an Employees' Indemnity Act, and it is to be regretted that our General Assembly did not consider some law to meet the crying injustice of the present state of law between employers and employees.